NOBIES WEAH EZIKE A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ABDULL HAMID EMBONG JCA
WAN ADNAN MUHAMAD JCA
JEFFREY TAN JCA
[CRIMINAL APPEAL NO: B-05-84-2005]
14 SEPTEMBER 2009 C

CRIMINAL PROCEDURE: *Appeal - Appellate court, power and duty of - Misdirection by trial court - Whether failure or miscarriage of justice occasioned thereby - Whether miscarriage of justice occasioned if sufficient independent evidence to warrant the decision in existence - Criminal Procedure Code, s. 422(c) - Evidence Act 1950, s. 167 - Courts of Judicature Act 1964, s. 60(1)* D

CRIMINAL PROCEDURE: *Appeal - Evidence - Improper admission or rejection of evidence - Sufficient independent evidence to justify decision on record - No miscarriage or failure of justice occasioned - Whether appeal ought to be allowed and decision set aside - Criminal Procedure Code, s. 422(c) - Evidence Act 1950, s. 167 - Courts of Judicature Act 1964, s. 60(1)* E

CRIMINAL PROCEDURE: *Exhibits - Evidence - Exhibits improperly considered by trial court - Whether appellate court ought to cast off such exhibits on appeal - Whether decision ought to be reconsidered without such exhibits* F

CRIMINAL PROCEDURE: *Judgment - Delay in writing - Three year delay by trial judge in handing down the written judgment - Demeanour of witnesses not raised in the judgment - No prejudice to accused shown - Whether judgment ought to be set aside* G

CRIMINAL PROCEDURE: *Trial - Misdirection - Sufficient independent evidence to justify decision on record - No miscarriage or failure of justice occasioned - Whether decision of trial court ought to be set aside - Criminal Procedure Code, s. 422(c) - Evidence Act 1950, s. 167 - Courts of Judicature Act 1964, s. 60(1)* H

I

A ***EVIDENCE:*** *Appeal - Evidence - Improper admission or rejection of evidence - Sufficient independent evidence to justify decision on record - No miscarriage or failure of justice occasioned - Whether appeal ought to be allowed and decision set aside - Criminal Procedure Code, s. 422(c) - Evidence Act 1950, s. 167 - Courts of Judicature Act 1964, s. 60(1)*

B

EVIDENCE: *Improper admission of evidence - Whether occasioned a failure of justice - Exhibits improperly considered by trial court - Whether appellate court ought to cast off such exhibits on appeal - Whether decision ought to be reconsidered without such exhibits - No miscarriage or failure*
C *of justice occasioned - Whether decision of trial court ought to be set aside - Criminal Procedure Code, s. 422(c) - Evidence Act 1950, s. 167 - Courts of Judicature Act 1964, s. 60(1)*

The appellant was convicted in the High Court on a charge of
D drug trafficking and sentenced to death. He appealed against conviction and sentence. On appeal, counsel for the appellant urged the Court of Appeal to quash the conviction and set aside the sentence on the following grounds: (i) the trial judge had taken into consideration several exhibits that had not been properly
E admitted as evidence; (ii) the trial judge had referred to the wrong provision when calling upon the appellant to enter his defence; and (iii) there was a three year delay by the trial judge in furnishing his grounds of judgment.

Held (dismissing the appeal)
F **Per Jeffrey Tan JCA delivering the judgment of the court:**

(1) The trial judge had indeed fallen into error when he took into consideration the impugned exhibits. However, the appeal could not be allowed merely because the trial judge had taken
G into consideration that which he ought not to have considered, in view of s. 422(c) of the CPC, s. 167 of the Evidence Act and s. 60(1) of the Courts of Judicature Act 1964. (para 9)

H **(2)** The duty of an appellate court when dealing with an appeal where a misdirection has occurred is to consider whether there has been a failure of justice or a miscarriage of justice. The object of s. 422 of the CPC is to secure justice by preventing the invalidation of a trial already held on the ground of any
I error, omission or irregularity, unless it has occasioned a failure of justice. There would be no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction.

Lorensus Tukan v. PP (foll); *Elahee Buksh* (foll); *PP v. Sa'ari bin Jusoh* (foll); *Mohd Haikal bin Mohd Khatib Saddaly & Ors v. PP* (refd); *PP v. Ishak bin Hj Shaari & Other Appeals* (refd); *Tunde Apatira & Ors v. PP* (foll). (paras 10, 11, 12, 13 & 14) A

(3) Since the impugned exhibits should not have been considered, they ought to be cast off and the prosecution's case had to stand without those exhibits. However, considering the oral evidence of the witnesses and the other properly admitted exhibits, the prosecution had more than proved beyond all reasonable doubt the ingredients of the offence. (paras 15, 16, 17 & 18) B C

(4) Although the wrong provision had been cited by the trial judge (s. 180 of the post amending Act A979), for all intents and purposes the applicable provision (s. 180 of the pre amending Act A979) had been satisfied. The applicant had not been wrongly called to enter his defence. (para 19) D

(5) On the facts, the defence of the appellant was a mere denial and in reality was no defence. On the totality of the evidence, the conviction was the correct verdict. The misdirection had not occasioned any miscarriage of justice. (para 20) E

(6) Delay *per se* in supplying the written judgment does not automatically render the decision of a trial judge liable to be vitiated or to be set aside. The delay must have resulted in prejudice. In the instant case, although the grounds of judgment were written some three years after the trial judge had delivered his final decision, it was not shown by counsel nor detected by the Court of Appeal how the appellant was prejudiced by the delay. Since the demeanour of witnesses did not feature at all in the grounds of judgment, the trial judge's impression of the witnesses could not have affected his judgment. *Amathevelli P Ramasamy v. PP* (foll); *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* (refd). (paras 21, 22, 23 & 24) F G H

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah disabit oleh Mahkamah Tinggi atas kesalahan mengedar dadah dan telah dijatuhkan hukuman mati. Beliau merayu terhadap sabitan dan hukumannya. Semasa rayuan, peguam perayu memohon Mahkamah Rayuan supaya membatalkan sabitan dan hukuman atas alasan-alasan berikut: (i) hakim bicara I

telah mengambilkira beberapa eksibit yang tidak diterima-masuk secara teratur sebagai keterangan; (ii) hakim bicara telah merujuk kepada peruntukan undang-undang yang salah bilamana memanggil perayu untuk membela diri; dan (iii) terdapat kelengahan selama tiga tahun oleh hakim bicara dalam menyediakan alasan penghakimannya.

Diputuskan (menolak rayuan)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara sememangnya khilaf apabila mengambilkira eksibit-eksibit yang dicabar tersebut. Bagaimanapun, rayuan tidak boleh dibenarkan semata-mata kerana hakim bicara telah mempertimbang sesuatu yang beliau tidak harus mempertimbangkan, mengambilkira s. 422(c) KTJ, s. 167 Akta Keterangan dan s. 60(1) Akta Mahkamah Kehakiman 1964.

(2) Tugas sebuah mahkamah rayuan apabila berurusan dengan rayuan di mana suatu salah arahan telah berlaku ialah dengan melihat sama ada terdapat sebarang kegagalan keadilan atau salahlaksana keadilan. Objek s. 422 KTJ adalah bagi mewujudkan keadilan dengan cara menghalang pembatalan sesuatu perbicaraan yang sudah pun berjalan hanya atas alasan kekhilafan, ketinggalan atau ketidakteraturan, kecuali jika ianya menyebabkan kegagalan keadilan. Kegagalan keadilan atau salahlaksana keadilan tidak akan berlaku jika terdapat keterangan yang mencukupi untuk mewajarkan sabitan. *Lorensus Tukan v. PP* (diikuti); *Elahee Buksh* (diikuti); *PP v. Sa'ari bin Jusoh* (diikuti); *Mohd Haikal bin Mohd Khatib Saddaly & Ors v. PP* (dirujuk); *PP v. Ishak bin Hj Shaari & Other Appeals* (dirujuk); *Tunde Apatira & Ors v. PP* (diikuti).

(3) Oleh kerana eksibit-eksibit yang dicabar itu tidak sepatutnya dipertimbangkan, maka ia seharusnya disisihkan dan kes pendakwaan haruslah berdiri tanpa eksibit-eksibit tersebut. Walau bagaimanapun, mengambilkira keterangan lisan saksi-saksi serta lain-lain keterangan yang diterima-masuk dengan teraturnya, nyata bahawa pendakwaan telah membuktikan ingredien-ingredien kesalahan lebih dari di luar keraguan munasabah.

(4) Walaupun peruntukan yang salah dicatatkan oleh hakim bicara (s. 180 Akta A979 pasca pindaan), tuntutan peruntukan yang terpakai (s. 180 Akta A979 pra pindaan), bagi semua tujuan dan maksud, telah dipenuhi. Oleh itu, perayu tidak dipanggil untuk membela diri dengan secara salah.

(5) Berdasarkan fakta, pembelaan perayu hanyalah satu penyangkalan dan itu bukanlah suatu pembelaan. Atas keseluruhan keterangan, sabitan adalah satu keputusan yang tepat. Maka salah arahan tidak menyebabkan sebarang salahlaksana keadilan.

(6) Kelengahan *per se* dalam menyediakan penghakiman bertulis tidak secara automatik menyebabkan keputusan seseorang hakim bicara itu menjadi terjejas atau boleh diketepikan. Kelengahan hendaklah membawa kepada prejudis. Dalam kes semasa, walaupun alasan penghakiman disediakan lebih kurang tiga tahun selepas hakim memberikan keputusan muktamadnya, peguam gagal membuktikan dan Mahkamah Rayuan juga tidak nampak bagaimana kelengahan itu telah memprejudiskan perayu. Memandangkan demeanour saksi-saksi langsung tidak diambilkira oleh alasan penghakiman, tanggapan hakim bicara terhadap saksi-saksi tidak mempunyai apa-apa kesan terhadap penghakimannya. *Amathevelli P Ramasamy v. PP* (diikuti); *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* (dirujuk).

Case(s) referred to:

Amathevelli P Ramasamy v. PP [2009] 3 CLJ 109 FC ***(foll)***
Elahee Buksh 5 Suth WR 80 ***(foll)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(foll)***
Mohd Haikal Mohd Khatib Saddaly & 7 Ors v. PP [2009] 1 LNS 292 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843; [2003] CLJ JT(3) FC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(foll)***
The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor [2008] 3 CLJ 221 FC
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC

Legislation referred to:

Courts of Judicature Act 1964, ss. 60(1), 92
Criminal Procedure Code, ss. 180, 422(c)
Dangerous Drugs Act 1952, ss. 2, 37(d)
Evidence Act 1950, s. 167

A *For the appellant - Karpal Singh; M/s Karpal Singh & Co*
For the respondent - How May Ling DPP

Other source(s) referred to:
Sarkar on Criminal Procedure, 7th edn, p 1367

B *Reported by Andrew Christopher Simon*

JUDGMENT

C **Jeffrey Tan JCA:**

[1] The charge was that the appellant, on 9 March 1996 at about 12.20pm, at UPS No, 11, Jalan Tandang, Petaling Jaya, committed the act of trafficking in a dangerous drug, to wit, 412.8
D grams of heroin.

[2] At the close of the prosecution case, the learned trial judge found that a *prima facie* case had been made out. The accused was ordered to enter upon his defence. At the end of the entire case, the learned trial judge held that there was no doubt as to
E guilt. Against conviction and sentence, the appellant appealed.

[3] One of the arguments raised by Mr Karpal Singh for the appellant was that the learned trial judge had taken into consideration certain exhibits that were yet not admitted in
F evidence. To be specific, it was contended that identification exhibits (IDs) were taken into consideration by the learned trial judge. On account of that argument, we would summarise the prosecution story without any citation of those IDs.

G **[4]** The basic story of the prosecution was that at about 12.20pm on 9 March 1996 the appellant handed a sealed brown envelope containing the said proscribed drugs to a courier company (United Parcel Service) for delivery to the USA. The complete story of the prosecution could be summarised as follows.

H **[5]** Royal Customs Officers had been stationed at Room 309 of the YMCA Hostel, 95 Jalan Padang Belia, Kuala Lumpur, to observe the activities of African nationals. At about 1.30am on 8 March 1996, the appellant with Liberian passport No. 041401 checked in as guest at the said Hostel. The receptionist on duty
I (SP10 – Bade de Rozario) assigned Room 304 to the appellant.

Later that day, the appellant asked the receptionist on duty (SP11 – C. Anabarasan a/l A. Chockalingam) to fax the following particulars – the address of the said Hostel and Room 304 – to Thailand. Later, the appellant enquired from SP11 if there were any fax message for him. There was a fax message for the appellant from the fax number that the appellant had earlier provided. SP11 handed that fax message to the appellant. Later, SP11 gave that fax number from Thailand, which he had noted on a piece of paper, to SP16 (Cheong Tuck Meng, a customs officer stationed at the said Hostel). The next morning (9 March 1996), the appellant was at United Parcel Service (UPS), a courier company. The appellant wanted something to be couriered to the USA. The UPS supervisor (SP7 – Ru'aidi bin Idris) directed the appellant to approach the UPS counter. There, the appellant said to the UPS clerk (SP8 – Raja Diyana bte Raja Zulkifli) that the thing he wanted to be couriered was a file and a catalogue. The appellant produced a sealed brown envelope. SP8 placed that brown envelope into a box (UPS pack). The weight of the UPS pack and contents was recorded on the airway bill. The particulars of the consignor and consignee were filled up by the appellant. The appellant filled in the particulars of the consignor as "Edwin Hill, 95 Jalan Padang Belia, 50470, KL". SP8 handed the shipper's copy of the said airway bill to the accused. The customs declaration was filled up by SP8 at the request of the appellant. The appellant signed "NWE" on the customs declaration and airway bill. SP8 handed the UPS pack and contents to her supervisor (SP7 – Ru'aidi bin Idris). Later (still on 9 March 1996), the accused asked the receptionist on duty at the said Hostel (SP12 – Sritharan a/l Radhakrishnan) to fax the airway bill. SP12 did so. When asked what had he faxed, SP12 showed a copy of the airway bill to SP15 (Ramakrishnan a/l Ramasamy, a customs officer).

[6] At about midday (still on 9 March 1996), two customs officers (SP13 – Selvanatham a/l Chelliah, and SP16 – Cheong Tuck Meng) were at UPS. SP13 showed a copy of the airway bill to SP7 and asked for the consignment. SP7 found the consignment in the sorting bin and handed it to SP13. On his inspection, SP13 found that the name and address of the consignee of the consignment under the airway bill and the name and address of the consignee on his copy of the airway bill were the same (Tony Benson, 4920 Avenue K, Suite 66, Brooklyn, NY.

A USA). SP13 found that the tracking number of the consignment under the airway bill and the tracking number on his copy of the airway bill were the same (3975 4200 595). The customs declaration at the back of the UPS pack stated that the content was a file sample. SP13 asked SP8 to point out the consignor. B From photographs shown to her, SP8 identified the consignor of the consignment under the airway bill. SP13 opened the UPS pack. Inside the UPS was a brown envelope. Inside that envelope was a black folder. Inside the folder were a Casio calculator and a memo pad. SP13 slit the sides of the folder and detected a C powdery substance that was later found by a government chemist to be heroin.

[7] From there, SP13 and SP16 returned to their office where SP13 then deposited the UPS and its contents into a safe. That D done, SP13, SP16 and one other customs officer (Jagjit Singh) then proceeded to the said Hostel. They were joined there by SP15 and one other customs officer (Amar Singh). At 4.10pm, the appellant was seen climbing the stairs. SP15 and Jagjit Singh followed the appellant up the stairs. When the appellant reached E the third floor, SP13 introduced himself and his officers, and then informed the appellant that he was arresting him (appellant) for trafficking. SP13 also cautioned the appellant. The appellant resisted arrest (see p. 102 of the appeal record). SP13 handcuffed the appellant. SP13 escorted the appellant to Room 304. SP13 F asked for the room key. From his right trouser pocket, the appellant produced that key. SP15 searched Room 304. On the bed was a sling bag (see 135AR). Inside the pocket of the sling bag, was the shipper's copy of the said airway bill. Later, back at his office, SP13 took out the UPS pack and its contents from the G safe where he had deposited them. In the presence of the appellant, SP13 slit open the sides of the folder and removed from within two packets containing a white powdery substance, and placed those packets of substances into a plastic bag that SP13 then sealed. Upon analysis, a government chemist (SP3 – Cheong H Meow Kioon) found that the said powdery substance contained 412.8 grams of heroin.

[8] In terms of the evidential material, all the above were found in the summary of the prosecution evidence by the learned trial I judge. But we also found that in his grounds of judgment the learned trial judge had taken as admitted that which were yet not properly admitted in evidence at the close of the entire case. The

guest registration card in which the appellant allegedly signed "NWE" was not exh. P39. The guest registration card was yet ID39 at the close of the entire case. The payment receipt (ID52) allegedly issued to the appellant for the fax message to Thailand, the message (ID51) to Thailand, the customs declaration (ID6E), and the UPS pack (ID6A) were yet IDs; all were yet not properly admitted in evidence at the close of the prosecution case (see list of exhibits at 196-203AR). From the record, we could not make out why that was so. Suffice it to say that the learned trial judge should have been alerted, since he himself specifically referred to the fax message as ID51 in his grounds of judgment (see 614AR), that all exhibits had not been properly admitted in evidence. Be that as it may, it remained that the learned trial judge should not have taken those IDs into consideration.

[9] We accept that the learned trial judge fell into error when he took into consideration the guest registration card (ID39), the payment receipt (ID52), the fax message to Thailand (ID51), the customs declaration (ID6E), and the UPS pack (ID6A). But we could not allow the appeal merely on account of the fact that the learned trial judge had taken into consideration that which he, with respect, should not. For a start, s. 422(c) of the Criminal Procedure Code provided that the finding, sentence or order passed by a court of competent jurisdiction shall not be reversed or altered on account of the improper admission or rejection of any evidence, "unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice". Then again, s. 167 of the Evidence Act which provided that "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision". And specifically in relation to the duties and powers of the Court of Appeal, s. 60(1) of the Courts of Judicature Act 1964 provided:

> At the hearing of an appeal the (Court of Appeal) shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the (Court of Appeal) may thereupon confirm, reverse or vary the decision of the (High

A Court), or may order a retrial or may remit the matter with the opinion of the (Court of Appeal) thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

B Provided that the (Court of Appeal) may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

C **[10]** The duty of an appellate court in dealing with an appeal where misdirection has occurred was put by the former Supreme Court per Seah SCJ in *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162, as follows:

D Misdirection is not of itself a sufficient ground to justify interference with the verdict; the appellate court must proceed respectively to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has occasioned a failure of justice. If the court so finds, then it has a duty to
E interfere. In deciding whether there has been a failure of justice in consequence of a misdirection, the appellate court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent one convicted (see *Abdul Rahim v. King-Emperor* (1945-46) 73 IA 77).

F **[11]** The following test propounded by Sir Barnes in *Elahee Buksh* 5 Suth. WR 80 (where the trial judge had seriously misdirected the jury) in dealing with an appeal where misdirection has occurred was adopted by the former Supreme Court in *Lorensus*
G *Tukan*:

That the verdict and conviction ought not to be set aside if the court be of opinion that the verdict was warranted by the evidence, and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the judge with the
H aid of assessors, instead of by jury.

[12] The overriding concern is whether has been a failure of justice or a miscarriage of justice (see *Lorensus Tukan*, where it was held by the former Supreme Court that the words "failure of
I justice" in s. 422 of the Criminal Procedure Code should carry the same meaning as "miscarriage of justice" under the proviso to

s. 60 of the Courts of Judicature Act 1964). The object of s. 422 of the CPC is to secure justice by preventing the invalidation of a trial already held on the ground of any error, omission or irregularity, unless it has occasioned a failure of justice (see *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197, per Augustine Paul FCJ quoting *Sarkar on Criminal Procedure* (7th edn) at 1367). "It is certainly the duty of the appellate court to decide whether in a particular case any error, omission or irregularity is curable under s. 422 of the Criminal Procedure Code … the appellate court must also decide whether the misdirection in law has occasioned a failure of justice. See *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843 (CA), with a coram of five judges" (*Mohd Haikal Mohd Khatib Saddaly & 7 Ors v. PP* [2009] 1 LNS 292 per Abdul Malik Ishak JCA).

[13] There would be no miscarriage or failure of justice where there is sufficient evidence to warrant the conviction. If, but only if, the error has occasioned a failure of justice, would the Court of Appeal declare the trial a nullity by reason that the misdirection amounted to an illegality (*PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843; [2003] CLJ JT(3)). So, in *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, the Federal Court held that where the evidence is clear and cogent, an appellate court may affirm a conviction despite a misdirection (for the record, *Tunde Apatira* was decided at first instance in 1995 before the double presumption rule had come into being in *Muhammed Hassan v. PP* [1998] 2 CLJ 170).

[14] In *Tunde Apatira*, Gopal Sri Ram JCA, as he then was, thus summed up the way in which the proviso to ss. 60 and 92 of the Courts of Judicature Act is to be applied:

> The expression 'miscarriage of justice' appears in the proviso to s. 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in section 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:
>
> > Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention.

In *Mraz v. The Queen* [1955] 93 CLR 493 at p 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said:

> It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

In *Krishna Murthy v. Abdul Subban* [1965] 1 Cr LJ 565 & p 576, Hedge J when dealing with the Indian equipollent of s. 422 of our Criminal Procedure Code said:

> The expression 'a failure of justice has in fact occasioned thereby' found in s. 535(1), Cr Pc does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of 'failure of justice' in ss. 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

In *Rattan v. R* [1974] CLR 510 at p 516. However, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross v. PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v. PP* [1994] 1 MLJ 265 illustrates the exception.

[15] Since it should not have been considered, we cast off the said IDs. The prosecution story must stand without those IDs or whatever other IDs. Yet from our close scrutiny of the record we find that the extant, namely the oral testimony of the witnesses and the properly admitted exhibits, had more than proved beyond all reasonable doubt that at the time and place in question the Appellant handed a brown envelope (P6C) containing the said drugs (in plastic packets P6 (F & G)) to a courier company (UPS) for delivery to the USA.

[16] Those primary facts carried the following evidential ramifications, (i) that the appellant had physical custody and or control of the brown envelope (P6C) containing the said drugs, or else, without either custody or control, the appellant could not

A have handed that brown envelope (P6C) containing the said drugs to the courier company, and, (ii) that the accused had sent the said brown envelope (P6C) containing the said drugs to the USA. That P6C was indeed the consignment was affirmed by SP8, who received the consignment, and by SP13, who inspected the
B consignment and found that the airway bill on the assignment was identical to his copy (P18) of the airway bill. Incidentally, we find that P18 was not improperly admitted, for it was direct evidence of the very document that SP12 handed to SP15. Being a photocopy, P18 was secondary evidence only with respect to the
C statements contained therein.

[17] In so far as the identity of the consignor of that brown envelope was concerned, it was most conclusively proved by SP7 and SP8 and then by the airway bill (P18A) tucked in the sling
D bag (P22) found in the room (304) that the appellant solely occupied. Indeed, the airway bill (P18A) entirely corroborated SP8's identification of the appellant as the consignor. That the appellant was the consignor of the brown envelope (P6C) was entirely borne out by the evidence. And in so far as guilty
E knowledge was concerned, that was evinced to an extent by the fact that the accused had falsely said to SP8 that the brown envelope (P6C) contained a file and catalogue. In any case, with undoubted proof of custody and or control, s. 37(d) of the Dangerous Drugs Act (Act) applied, and knowledge of the
F contents of the brown envelope (P6C) could be consequently presumed. Section 2 also applied, as the act of sending was a direct trafficking activity within the meaning of the Act be it prior to or post Amendment Act 1167. All ingredients of the offence had been proved without those impugned IDs.

G **[18]** The UPS pack was not properly tendered in evidence. But that did not result in any break in the chain of evidence. If truth be told, the act of trafficking was completed when the appellant handed the brown envelope containing the said drugs to UPS for
H delivery to the USA. The fact that the consignment was intercepted was of no consequence to the act. And that act of trafficking was proved beyond all reasonable doubt by the oral testimony of SP7 and SP8, and by the production of the brown envelope (P6C), the black folder (P6D) and its hidden contents
I (in plastic packets P6 (F & G)), and airway bill (P18A). All necessary exhibits had been admitted in evidence. The UPS pack was not needed to prove the act of trafficking. That UPS pack

and other IDs were not essential proof. Really, all other documentary exhibits, even if properly admitted, could only put it over the top, of a case that had already been proved beyond all reasonable doubt by the oral testimony of SP7 and SP8, and by the production of those latter exhibits.

[19] The wrong s. 180 (ie, post Amending Act A979) might have been cited by the learned trial judge. But it was also true that a case had been made out which if unrebutted would surely warrant a conviction. To all intents and purposes, the then applicable s. 180 (ie, pre Amending Act A979) had been satisfied. The appellant was not wrongly called to enter upon his defence.

[20] The defence was a denial. The accused denied that he was ever at the courier company, and or that he was acquainted with Tony Benson, Edwin Hill or John Wiliam (see 188AR). But at the same time, the accused also admitted that his signature was on the airway bill. That, for all practical purposes, had put paid to the denials of the appellant. There was no defence. There was no doubt on guilt. On the totality of the evidence, conviction was the correct verdict. The misdirection had not occasioned any miscarriage of justice.

[21] The delay (three years) by the learned trial judge to furnish the grounds of judgment was raised as a ground to quash the conviction. But delay *per se* in supplying the written judgment does not automatically render the decision of a trial judge liable to be vitiated or to be set aside. It must be demonstrated that delay has resulted in prejudice. In *Amathevelli P Ramasamy v. PP* [2009] 3 CLJ 109, the delay of five years in supplying the grounds of judgment was raised as a ground of appeal in both appeals to the Court of Appeal and Federal Court. Ground 1 of the petition of appeal to the Federal Court contended that that delay could have caused the trial's judge's impression of demeanour of witnesses to have been blurred and or could have increased the chances of omission on the part of the trial judge of material facts and issues in favour of the accused:

> (1) The learned judges of the Court of Appeal misdirected themselves in not concluding that the inordinate and unexplained delay of five years in supplying the grounds of judgment after notice of appeal had been filed had occasioned a manifest miscarriage of justice in that there would have been prejudice caused to the accused on the basis that there was every likelihood

A not only that the trial judge's impression of demeanour of witnesses would be blurred but also the delay would have increased the chances of omission on the part of the learned trial judge to deal with material facts and issues in the grounds of judgment which would have been favourable to the appellant.

B **[22]** His Lordship, Ariffin Zakaria CJ (Malaya), declared the stand of the Federal Court as follows:

The Court of Appeal in the judgment written by Raus Sharif JCA took the view that delay *per se* in supplying the written judgment
C by the trial judge does not automatically render the decision of the trial judge to be vitiated or liable to be set aside. The court relied on the view expressed by the then Supreme Court in *Tan Hun Wah v. Public Prosecutor and another appeal* [1994] 1 MLJ 382 and said:

D In the present case, it took the learned trial judge about five years to supply the grounds of judgment to the accused. It is regrettable, but we are of the same view with the Supreme Court that it should not necessarily result in vitiating the whole proceedings. This is more so when it is
E not shown to us through the notes of evidence that the appellant has suffered prejudice as the result of the delay in supplying the grounds of judgment to the accused. Further, we hold the view that in the administration of justice, the courts must be fair not only to the accused person, but must also be fair to the State and society. It would not be
F fair to the State and society whose penal law are made and administered, if the accused is given an outright acquittal just because of the delay in supplying the grounds of judgment. This is especially so when the accused has been found guilty of a serious crime of murder. We, therefore hold that this appeal must be heard on its merits.

G A pertinent observation made by Mohamad Azmi SCJ in *Tan Hun Wah* is this: The principle that 'Justice delayed is justice denied' is of general application, and it does not follow that every form of delay, though frowned upon by the courts, should result in
H vitiating the whole proceedings.

Delay could occur in two ways; delay in making decisions and delay in delivery of written grounds of judgment. These are two separate things. In some cases the decisions are made earlier and the written grounds are supplied at a later date, while in others
I both are delivered at one and the same time, especially where judgment is reserved …

[23] Then further down, His Lordship enunciated that it must be demonstrated from the record that delay has prejudiced the accused:

> In this case we have examined the authorities cited to us by learned counsel for the appellant but we find none that goes to support the proposition that delay *per se* in supplying the written grounds of judgment is sufficient to render the decision of the trial judge to be vitiated or liable to be set aside. The learned judge may in appropriate cases be castigated but that is not a sufficient reason to quash the conviction. Take the case of *Voon Chin Fatt v. Public Prosecutor* [1948-1949] MLJ Supp 131, where there was a delay of two years in delivering the grounds of judgment. Spenser Wilkinson J allowed the appeal by the accused/appellant for two reasons, namely, the delay in delivering the grounds of judgment which he said could have prejudiced the appellant's case and, secondly, because of the confusion between admissible and inadmissible evidence and of the fact that the admissible evidence was not as unassailable as the trial judge appeared to have thought. So on these two grounds the learned judge found that the conviction could not stand. Hence delay in supplying grounds of judgment was not the single reason that prompted the learned judge to come to the decision that he did. Similarly in *Tan Hun Wah v. Public Prosecutor and another appeal*, it was held that delay alone is not a sufficient ground to cause the proceedings to be vitiated, there must be more to it. In that case the failure of the prosecution to call one Alenalli Singh or offer him as a witness was held to be a fatal omission which together with the long delay in the court proceedings was sufficient to have prejudiced the appellant.
>
> Therefore, it is necessary for the appellant in the present case to go one step further and demonstrate to us through the notes of evidence the manner in which the appellant had been prejudiced by the delay to warrant a vitiation of the whole proceedings. This, learned counsel for the appellant failed to do. On that premise we are of the view that the Court of Appeal had correctly dismissed this ground in the appeal by the appellant.

[24] And it was not shown by learned counsel nor was it detected from our examination of the record, that the appellant could have been prejudiced by the delay in supplying the grounds of judgment. Yes, the grounds of judgment were written about three years after the learned trial judge had delivered his final decision. But the final decision was based on hard evidence, not on the ethereal. The grounds of judgment of the learned trial

judge reflected that. Demeanour of witnesses did not feature at all in the grounds of judgment. Hence, however blurred, the learned trial judge's impression of the witnesses could not have affected his judgment (*The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik Syed Mohamed & Anor* [2008] 3 CLJ 221), which was evidently based on hard evidence alone. That is not to say however that we approve of the delay by the learned trial judge to furnish his grounds of judgment.

[25] It was for those reasons that we had dismissed the appeal and affirmed the conviction and sentence, on 30 July 2009.